

ADMINISTRATIVE LAW - Migration - Application for entry permit
- Appeal against decision of Immigration Review Tribunal
refusing application - Application made on the basis that the
relevant person was the spouse of the applicant for review, an
Australian citizen - Issue before Tribunal whether marital
relationship genuine and continuing - Whether Tribunal
misdirected itself as to nature of a genuine marital
relationship - Whether any presumption as to genuineness - No
error of law in Tribunal's conclusions - Application
dismissed.

Migration Regulations, reg. 100.32 and 100.33

PREM CHAND v. MINISTER FOR IMMIGRATION AND MULTICULTURAL
AFFAIRS AND RICHARD PHILLIPS and ANTHONY PUN
constituting the IMMIGRATION REVIEW TRIBUNAL

NG. 415 of 1996

CORAM: WILCOX J
PLACE: SYDNEY
DATE: 13 DECEMBER 1996

IN THE FEDERAL COURT OF AUSTRALIA)
NEW SOUTH WALES DISTRICT REGISTRY)
GENERAL DIVISION)

No. NG 415 of 1996

BETWEEN: PREM CHAND

Applicant

AND: MINISTER FOR
IMMIGRATION AND
MULTICULTURAL AFFAIRS
AND RICHARD PHILLIPS
and ANTHONY PUN
constituting the
IMMIGRATION REVIEW
TRIBUNAL

Respondents

CORAM: WILCOX J
PLACE: SYDNEY
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MINUTES OF ORDER

THE COURT ORDERS THAT:

1. The application be dismissed.
2. The applicant pay the costs of the first respondent.

Note: Settlement and entry of orders is dealt with in
Order 36 of the Federal Court Rules.

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EXTEMPORE REASONS FOR JUDGMENT

WILCOX J: This is an application for review of a decision of the Immigration Review Tribunal in connection with an application by the present applicant, Prem Chand, for the issue of a visa to Sunita Devi. The evidence put before the Tribunal, and accepted by it, established that Mr Chand is a native of Fiji and he came to Australia in February 1987 as a tourist. In April 1988 he married an Australian permanent resident and consequently obtained a right of permanent residence in Australia. The marriage was not successful; it ended in divorce in July 1990. Mr Chand became an Australian

citizen on 3 September 1991.

In November 1992, Mr Chand and his mother visited Fiji. Apparently he arrived on or about 15 November. He gave evidence that the purpose of the visit was for a holiday but he had asked his mother to "*arrange a girl*" for him to marry. Prior to the visit his mother had spoken to her sister about arranging a suitable girl for her son. Shortly after arrival in Fiji Mr Chand and members of his immediate family met with Ms Devi, who was not then married, and members of her family. After discussion it was agreed that there would be a marriage between Mr Chand and Ms Devi. This was performed at Lautoka on 24 November 1992.

The evidence was that the ceremony was a traditional Hindu wedding ceremony which lasted two days. About 40 guests were present and the Tribunal was told that the cost of the wedding was about \$5,000. The couple honeymooned in the Chand family home at Nandi for a week and then spent a week with the bride's family at Ba. Mr Chand returned to Australia shortly afterwards, leaving Ms Devi in Fiji. Either Mr Chand or Ms Devi made an application for a visa for her to visit Australia. It is not clear who was the applicant, but it is clear that Mr Chand was to be the sponsor for the purpose of the application.

Shortly after the application was lodged Mr Chand wrote a letter withdrawing the application. Early in 1993 a further application was made. This application was also

withdrawn by Mr Chand. The explanation for these withdrawals given to the Tribunal was that Mr Chand was involved at the time in a relationship with another woman in Australia, and she was unhappy at the prospect of Ms Devi coming to Australia.

Mr Chand told the Tribunal he wished to establish a normal married life with Ms Devi. She made the same claim. However, the Tribunal was not satisfied about the genuineness of these claims. The Tribunal spent some time examining issues created by the evidence of Mr Chand and Miss Devi concerning their relationship, in particular the circumstances in which the previous applications had been withdrawn. Mr Chand denied authorship of the withdrawal letters until evidence was given by a document examiner who expressed the view that, as a matter of probability, although he could not be certain, the withdrawal letters were written by Mr Chand.

The Tribunal also noted a number of inconsistencies in the evidence of Mr Chand and Ms Devi about the extent of her knowledge of what had happened in relation to the applications, and Mr Chand's relationship with the woman in Australia. The Tribunal noted evidence put before it of contact and support. The relevant evidence fell into four categories. First, telephone accounts were tendered which showed a total of 152 calls over a period of 28 months from November 1993 to February 1995, these apparently being between

Mr Chand and Ms Devi. This averages 5.4 calls per month. Second, items of correspondence were tendered, including two cards and three letters for 1994, and four cards and six letters for 1995.

Third, there was documentary evidence of financial support provided by Mr Chand for Ms Devi over a period of 16 months between December 1993 and February 1995, totalling about \$3,000 Fijian. This averages about \$180 Fijian per month. I am told by counsel that at the relevant time the Fijian dollar was worth much the same as the Australian dollar. Fourth, the applicant stated that he had visited Fiji on three occasions, namely, 28 February to 25 March 1993, 31 October 1993 to 14 November 1993, and 22 December 1993 to 5 January 1994. So far as I am aware, this evidence was not corroborated by any documentary evidence.

The Tribunal referred to this material in giving its reasons for decision. The relevant part of the Tribunal's decision was as follows:

"For the Tribunal to be satisfied that it could set aside the previous decision it would have to accept that Mr Chand and Ms Devi were witnesses of truth. Mr Chand has repeatedly given contradictory evidence to the Department and to the Tribunal. The evidence is not about a minor matter. The Tribunal is still not sure that it really understands the true reason for the drafting of the letters withdrawing Mr Chand's support. Whatever those reasons may be, the Tribunal is of the view that it cannot

accept Mr Chand as a witness of truth and it cannot therefore accept uncorroborated his claim that the marriage is genuine. Ms Devi's evidence is likewise difficult to accept particularly in the light of her claim, which must be seen as ridiculous in the circumstances, that she has known since 1993 about the fact that her husband wrote the letters.

The Tribunal is conscious that there is a deal of evidence in support of the proposition that Mr Chand and Ms Devi have a genuine relationship, including evidence of communication between the parties, payments of money by Mr Chand to Ms Devi, and the support of both families to the arrangement. But this evidence is also consistent with a sham marriage, and perhaps with other relationships falling short of genuine marriage.

The Tribunal is also conscious that it should be careful not to impose expectations or stereotypes which are inappropriate to the peer group of the applicants, and that it must consider the composite picture, not just one aspect of the relationship: see Lynam v Director-General of Social Security (1983) 52 ALR 128, 131.

The Tribunal is obliged to decide whether external signs show that there is a genuine and continuing relationship between the parties. Because the Tribunal cannot accept the evidence of the major players in this application, the Tribunal cannot accept their claims that they have a genuine and continuing relationship as husband and wife."

Part 100 of the Migration Regulations, as they were at the relevant time, deals with spouse, visa and entry permits. The relevant regulations are lengthy. I will not set them out in full. It is sufficient to note the criteria.

Regulation 100.32 requires an applicant to demonstrate that he or she "is the spouse of an Australian

citizen or an Australian permanent resident." It is common ground that Ms Devi met this requirement. There was never any issue concerning her claim that she was lawfully married to Mr Chand pursuant to Fijian law at Lautoka on 24 November 1993.

The second criterion that must be met, and the one that has caused the problem in this case, is stated in Regulation 100.333: *"The Minister is satisfied that the marital relationship between the applicant and the applicant's spouse is genuine and continuing."*

In the case of an appeal to the Tribunal, the Tribunal stands in the shoes of the Minister; accordingly this regulation should be understood as requiring that the Tribunal be satisfied that the marital relationship is genuine and continuing. In the course of its reasons, the Tribunal referred to an unreported decision of a Full Court of this Court, *Minister of State for Immigration, Local Government and Ethnic Affairs v Dhillon* (Northrop, Wilcox and French JJ, 8 May 1990, not reported). In that case the Court referred to a statement made by Street CJ in *R v Cahill* (1978) 2 NSWLR 453 at 458 concerning the variety of purposes and motives, hopes and anticipations under which people enter marriage. The Full Court commented:

"It is not necessarily inconsistent with a genuine marriage relationship that it was entered into by one or both parties with a view to material benefit or advancement, as for example with the hope of becoming eligible to reside in a particular country."

The true test, we would suggest the only test, is whether at the time at which the matter has to be decided it can be said that the parties have a mutual commitment to a shared life as husband and wife to the exclusion of others."

As I have said, the Tribunal referred to *Dhillon* and clearly had this passage in mind.

Early in their reasons the members of the Tribunal stated, as the "essential question" to be determined by them, "*Whether the applicant and the principal have entered into a marriage relationship which is genuine and continuing.*" The person referred to as the applicant was Mr Chand; the person referred to as the principal was Ms Devi. So the question asked by the Tribunal was whether, on the evidence before it, those two people had entered into a marriage relationship that was genuine and continuing. As I have said, there was no issue that they had entered into a marriage relationship. The issue was whether this relationship was genuine and continuing.

The problem in addressing this question arises out of the circumstance that the parties have lived apart for almost the whole of the time since their marriage. In this case there was not the usual relationship and day-to-day opportunity for the performance of obligations and courtesies to one another that characterises most marriages. Under those circumstances, the task presented to the Tribunal was a difficult one. Necessarily, as it seems to me, the Tribunal had to put a great deal of reliance on its assessment of the

two parties to the marriage. Regrettably, from the point of view of the present applicant, the Tribunal found itself unable to accept uncorroborated evidence of either Mr Chand or Ms Devi. There were contradictions, not only between those two people, but in the statements made at different times by each of them. The contradictions do not, of course, mean that there was no genuine ongoing marital relationship, but they did make it very difficult for the Tribunal to be satisfied that there was a genuine ongoing marital relationship.

The Tribunal noted the material put before it in support of the submission that Mr Chand was doing as much as he could under the circumstances, and that this should be regarded as an indication of a genuine ongoing relationship. I have already summarised that material and I have quoted the passage at the end of its reasons in which the Tribunal acknowledges that the material provides *"a deal of evidence in support of the proposition that Mr Chand and Miss Devi have a genuine relationship."*

However, the Tribunal went on to point out that this evidence was also consistent with a sham marriage, and it seems to me that proposition cannot be denied. It is possible for people who wish to present the facade of marriage to ensure that there is contact between them by way of telephone calls and postcards, letters etc, and even financial payments, which will give the appearance of a genuine marriage when

there is not one, in fact.

Having regard to the amount of the financial support and the frequency of the telephone calls, some people may feel that the Tribunal's evaluation of the evidence is open to criticism. I do not wish to express a view about those matters; they were peculiarly matters of fact for the Tribunal to evaluate. Whether or not the Tribunal reached a correct conclusion in relation to those factors is not a matter of law for this Court.

As it seems to me, the Tribunal asked itself the right question and took into account relevant evidence bearing on that question. Some of it was favourable to the applicant, some adverse to his case. The Tribunal assessed the whole of the material and, at the end of the day, indicated that it was not affirmatively satisfied that there was a genuine ongoing relationship. This was the correct approach. The Tribunal did not suggest that the applicant bore any special onus of proof, only that it had to be satisfied that the relationship *"is genuine and continuing"*. Unfortunately for Mr Chand, it was not so satisfied.

Unless error of law is demonstrated, this Court has no right to interfere with the Tribunal's decision. Dr Churches, in arguing the matter on behalf of Mr Chand, drew attention to the traditional respect - perhaps veneration is a

better word - paid by the law to the institution of marriage. He pointed, by way of example, to the presumption of validity of marriage.

I would not wish to say anything that suggested hesitation about the wisdom of that presumption but it must be emphasised that it goes to the question whether there existed a legally valid marriage, a question not in dispute in the present case. The presumption has nothing to say about issues as to the existence of a genuine and continuing marital relationship, if they arise in a statutory context such as this. Dr Churches effectively conceded that point, and said that the Court ought to proceed by way of analogy in imposing a similar presumption on the test laid down in Regulation 100.333.

I understand the force of the submission, and it was put as persuasively as possible, but I do not think it should be accepted. The Regulation states its own test and it would not be appropriate for the Court to engraft an embellishment upon it. The test is stated in simple words. While it may be difficult to determine whether a particular relationship meets the test in some cases, this is the task that is given to the relevant decision maker. It should not be overlaid by a presumption that effectively substitutes a different test that is somewhat easier for applicants to meet. If it is the wish of Parliament or the Minister to take that step, then that is

another matter. I do not think it is for the Court to change the law in that way.

I have some sympathy with the situation in which Mr Chand and Ms Devi find themselves. They got off to a bad start, so far as Australian migration authorities were concerned, by the withdrawals of the earlier applications followed by Mr Chand's denials that it was he who had made the withdrawals. Their problem is compounded by the fact that they live in different countries and so cannot demonstrate the existence of a normal marital relationship. But my sympathy is not relevant. The question is whether the Tribunal erred in law in the way it dealt with the case. Despite Dr Churches' eloquence, I cannot see any error or law. The application must be dismissed.

[Counsel addressed]

Mr Beech-Jones has drawn my attention to the fact that there does appear to be some documentary corroboration of the fact that Mr Chand visited Fiji on at least some of the occasions he claimed. I do not think this makes any difference. The Tribunal does not appear to have doubted his claim.

As to the matter of costs, Mr Beech-Jones on behalf of the Minister seeks an order for costs. Dr Churches feels

he can say nothing in opposition to that, and I think he is correct about that. The normal course should apply; the application will be dismissed with costs.

I certify that this and the preceding ten (10) pages are a true copy of the Reasons for Judgment of his Honour Justice Wilcox.

Associate:

Dated: 13 December 1996

APPEARANCES

Counsel for the Applicant:	Dr S Churches	
Solicitor for the Applicant:	Newman & Associates	
Counsel for the Respondent:	R Beech-Jones	
Solicitor for the Respondent:	Australian Solicitor	Government
Date of hearing:	13 December 1996	